COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

D.T.E. 04-116

Investigation by the Department of Telecommunications and Energy Regarding the Service Quality Guidelines Established in Service Quality Standards for Electric Distribution Companies and Local Gas Distribution Companies, D.T.E. 99-84 (2001)

Reply Comments of The Berkshire Gas Company

April 5, 2005

I. OVERVIEW

In D.T.E. 04-116, issued December 13, 2004 (the "Order"), the Department of Telecommunications and Energy (the "Department" or "D.T.E.") solicited comments regarding its investigation and proposed changes to the existing service quality ("SQ") guidelines (the "Guidelines") established in D.T.E. 99-84 that are included in performance-based regulation ("PBR") plans for gas and electric distribution companies ("LDCs") pursuant to G.L. c. 164 § 1E ("Section 1E").

The Order requested comments from interested parties on the Guidelines and other matters relating to SQ standards. The Order requested that initial comments with respect to the Department's inquiry be filed on March 1, 2005 and that reply comments be filed by April 5, 2005. The Berkshire Gas Company ("Berkshire" or the "Company") filed its Initial Comments on March 1, 2005. Berkshire's Initial Comments noted that it has long been committed to providing outstanding service to its customers while making safety the cornerstone of its business. The Company submits that the fact that it has met all relevant SQ benchmarks since the implementation of the Guidelines remains the best evidence of this commitment.

Berkshire's Initial Comments addressed a variety of concerns with respect to SQ and the Guidelines. Berkshire's Initial Comments demonstrated that it was necessary and appropriate to preserve all of the fundamental terms of its Price-Cap Mechanism Plan ("PCM Plan"), a performance-based rate plan approved by the Department in D.T.E. 01-56. The Company's Initial Comments explained how departures from the established Guidelines would amount to "recontracting," the type of practice that threatens the incentives and viability of the PCM Plan. Berkshire explained that changes to the Guidelines that effectively mandated more rigorous service requirements could require corresponding rate or other adjustments in order to ensure that policies reflecting reasoned consistency are applied with respect to the PCM Plan.

Berkshire also addressed several of the specific inquiries raised by the Department. Berkshire's Initial Comments demonstrated the continuing appropriateness of the penalty offset feature reflected in the Guidelines. Berkshire further demonstrated that the existing standard with respect to the response to odor calls is appropriate and accurately applied by the Company. In terms of the so-called staffing level benchmark, Berkshire demonstrated its continuing compliance with this standard and the fact that staffing, in and of itself, was not the best measure for service quality. Rather, Berkshire explained that the performance benchmarks established within the Guidelines are the most appropriate and meaningful measure. In addition, the Company confirmed that standardizing benchmarks was inconsistent with the original purpose of the Guidelines and should not be adopted for Berkshire during the term of the PCM Plan. Similarly, Berkshire acknowledged that while "incentive" SQ opportunities may be appropriate, such an "upside" opportunity was not reflected in the PCM Plan and, therefore, should not be adopted for Berkshire until the PCM Plan terminates. As to service guarantees, Berkshire explained that its current service guarantee practice that provides symmetrical flexibility with respect to rescheduling strikes an appropriate balance. Finally, Berkshire's Initial Comments demonstrated that the Guidelines relating to property damage should be maintained until the expiration of the PCM Plan.

Several other parties also submitted Initial Comments in this proceeding. Berkshire's Reply Comments will address certain of these comments. Berkshire's failure to address or respond to the comments of any party should not be construed as the acceptance of such position or argument. Berkshire believes that the Guidelines continue to provide an appropriate structure to maintain the high quality service that Berkshire has provided to its customers. Berkshire believes that any material change should only be adopted prospectively and in the context of the comprehensive review of a specific, new PBR rate plan.

II. THE DEPARTMENT HAS RIGOROUSLY REVIEWED UTILITY SERVICE QUALITY

Some commenters in this proceeding have suggested that the Department has not applied a particularly rigorous level of review to service quality matters. Some commenters have also suggested, with little or wholly ambiguous support, that the SQ regime established by the Department is not effective as administered. Service quality, in fact, is subject to a wide range of review by the Department and the SQ components of the PCM Plan were subject to rigorous and comprehensive review at the outset. Moreover, the best evidence is that many aspects of the Guidelines are working wholly as intended; service quality standards are largely being satisfied or exceeded.

The Initial Comments of the Utility Workers Union of America ("UWUA") suggests the Department's process has the "appearance" of "effectively" excluding public participation. UWUA Initial Comments, p. 4. The Attorney General's Initial Comments also suggest that there has been an inappropriate level of review for utility SQ filings. AG Initial Comments, p. 2. Berkshire respectfully submits that these comments miss the mark. In fact, it appears that the Department has adopted a heavily "front-loaded," more administratively efficient approach to PBR ratemaking. Numerous parties participated actively in D.T.E. 99-84 and in the Company's PBR case, D.T. E. 01-56. In Berkshire's case, the PCM Plan was established after a comprehensive regulatory proceeding that necessarily covered many areas that related to service quality. Indeed, this proceeding involved weeks of evidentiary hearings and nearly a dozen witnesses. The SQ component of the PCM Plan was established after a comprehensive generic proceeding in docket D.T.E. 99-84 involving several rounds of comments, multiple hearings and post-decision rulings. The Department then applied a comprehensive, utility-specific process to implement the format for reporting on SQ performance. This process involved submitting company-specific versions of the approved Guidelines. In several cases, several refinements or drafts of these plans were required. Thus, a substantial effort was applied "up front" to ensure that an administratively efficient process for reviewing SQ performance was established.[1] This substantial "up front" effort has clarified the reporting requirements and ensured greater compliance in the annual reports and enhanced administrative efficiency. The Initial Comments of the Attorney General, in fact, acknowledge the depth of the Department's reporting requirements stating that "the DTE's requirements for utilities to file reports of their performance and policies relating to service quality are fairly extensive." AG Initial Comments, Att. 1, p. 33.

Berkshire submits that this approach has been wholly appropriate for the PCM Plan and SQ issues generally.[2] In addition, as noted by some commenters, there are other available remedies for the Department to address service quality concerns beyond the annual SQ Reports. UWUA Initial Comments, pp. 14-15; AG Initial Comments, Att. 1, p. 4. Further, Berkshire has not incurred a single penalty and, therefore, has never needed to rely upon an offset nor has there been any need for more comprehensive follow up review. Moreover, Berkshire's performance has generally improved even for standards where there had not yet

[1] The application of substantial "up front" efforts in exchange for later administrative efficiency is a cornerstone of PBR. By comparison, annual rate adjustments under the standards established within PBR proceedings are typically implemented through a streamlined review.
[2] The UWUA also concedes that the Department has "built a basically sound structure of service quality standards" for a variety of established benchmarks. UWUA Initial Comments, p. 2.

been sufficient data to establish a penalty performance standard. Indeed, the only consequence of this effort has been to raise the standards that the Company will be held to when a performance benchmark was established. Given the comprehensive "up front" review in D.T.E. 01-56 and D.T.E. 99-84 as well as the Company's continuing strong SQ performance, it is appropriate to conclude that the Department has indeed provided appropriate scrutiny to SQ issues relating to the Company.

III. PBR PLANS AS A REGULATORY "BARGAIN"

Berkshire believes that the Initial Comments of the Attorney General accurately state the nature of the "regulatory bargain" encompassed by a PBR plan. The Attorney General notes that "an SQ plan is a tool for regulators to use in conjunction with a . . . PBR plan," which plan constitutes the "overarching regulatory bargain." AG Initial Comments, Att.1, pp. 4-5. Any material, unilateral change to the bargain, must necessarily have one of two consequences. The first, as noted in KeySpan's Initial Comments, is that it is inappropriate to impose additional burdens when under a PBR Plan where there is no corresponding opportunity to adjust rates. KeySpan Initial Comments, p. 24. This unfair treatment may, in fact, not be consistent with the obligation to provide reasoned consistency in the ratemaking process. Alternatively, if SQ changes are made in the context of an overall revisiting of a PBR plan, then the benefits of the alternative structure secured by PBR plans are lost. PBR was adopted based upon findings that it provided greater efficiency incentives to regulated utilities. Indeed, longer term efficiency initiatives might well be pursued under a PBR plan if the utility had a reasonable opportunity and expectation of benefit from such initiatives. Moreover, the overall administrative benefits of PBR plans would be lost.

Berkshire noted in its Initial Comments that its PCM Plan was undertaken with the understanding and expectation as to the Department's SQ requirements. Berkshire submitted that extensive changes to the SQ structure could threaten the viability and underlying incentives of the PCM Plan and could be inconsistent with the obligation of reasoned consistency in Department decisions. In sum, to avoid the problems of fundamental fairness or a loss to the benefits of PBR, future revisions to SQ Guidelines should be applied on a going forward basis to new PBR plans at the cast off point, similar to the manner with which the Department has applied the current Guidelines.[3]

IV. RESPONSE TO D.T.E. INQUIRIES

1. ***Offsets***: *Currently, if an LDC incurs a potential penalty for substandard performance in a penalty provision measure, the Guidelines allow that LDC to offset that penalty if the LDC exceeded its benchmark in other penalty provisions. Please discuss whether the offset provision offers an incentive for an LDC to improve SQ and whether the use of penalty offsets should be continued in the future Guidelines.*

In its Initial Comments, the Company submitted that no change to the Guidelines with respect to the offset feature is warranted, necessary or appropriate. Berkshire submits that the primary reasons there should be no changes to this feature are: 1) utilities may be in a penalty position on a particular measure due to operational changes or unusual events outside the control of management that are not the result or indicative of service degradations; 2) the provision is effective in signaling above-average performance to employees, customers, shareholders and the Department; and 3) the provision serves an important function in counterbalancing an idiosyncrasy of the Department's benchmark system that may arise because the historical average and standard deviation for benchmarking are based on a specified ten years of data. It is important to note that Berkshire has consistently met its service quality standards in each measure and, to date, has not utilized the offset provision. The Initial Comments of Bay State Gas Company support the Company's position stating that "the offsets

[3] The penalty features of the Guidelines are not applied to utilities that do not have PBR rate plans. See D.T.E. 99-84, April 17, 2002 Letter Order, p. 5.

are intended to accept a 'normal variation' in performance before penalties (intended to punish service degradation) would be assessed." BSG Initial Comments, p. 3. Given the strong overall industry performance and Berkshire's own experience, the compelling evidence is that the offset feature does not diminish SQ incentives in any material way.

Several commenters addressed the offset feature of the Guidelines and suggested that such feature be eliminated. These commenters failed to address the fundamental and original bases for the offset feature and typically rely upon strained and inconsistent logic to secure a particular objective.

The UWUA, for example, argues for the elimination of offset opportunities because of its fear that offsets will somehow encourage studiedly poor performance for some measures. UWUA Initial Comments, p. 6. This argument ignores the numerous other remedies available to the Department and other stakeholders as well as the strong performance achieved to date. This argument also completely ignores the legitimate bases for offsets as summarized in the Attorney General's comments: "offsets were a legitimate means to mitigate the risks that utilities would be penalized for random variations in performance." AG Initial Comments, Att. 1, p. 19. Simply put, the offset feature of the Guidelines provides some redress for the fact that utilities may incur unfair or inappropriate penalties. That is, sometimes penalties due will be decreased to reflect the fact that, in other cases, there should not have been a penalty in the first place. The offsets were established as a reasonable, albeit not perfect, means to address both sides of the issue. The UWUA addresses only half of this problem in their suggestion to eliminate the offset feature. This one-sided approach should continue to be rejected by the Department.

2. ***Odor Calls***: *Currently, the benchmark for odor calls is 95 percent, which is an obtainable goal of all gas LDCs. Please discuss whether this benchmark should be strengthened in the future Guidelines and SQ plans and whether multiple calls regarding a single gas leak should be considered as a single odor call response.*

In its Initial Comments, the Company submitted that no change to the Guidelines on this measure is warranted, necessary or appropriate.[4] Several of the commenters, in addition to Berkshire, proffered that the fact that a particular service-quality goal is "obtainable" is not alone a basis for setting a higher performance benchmark. KeySpan Initial Comments, p. 11; New England Gas Initial Comments, p. 13. Further, the Company believes that the fact that LDCs are able to obtain the 95% goal is not problematical; rather it speaks to their commitment to public safety and puts forward that there is no higher priority for the gas utility than responding to odor calls as quickly as possible.[5]

The Initial Comments of the UWUA suggest that the Department "revise the standard upward, particularly in light of the fact that companies use their easy-to-achieve excess performance relative to the 95% standard as a means to offset substandard performance in other areas." UWUA Initial Comments, p. 7. This notion that the Guidelines should be made a vehicle for punishing acceptable performance or improving service quality has been dismissed by the Department in the past. In the June 29th Order, the Department acknowledged that "the intent of this proceeding and G.L. c. 164 1E(c) is to ensure adequate service." June 29th Order, p. 27. See also UWUA Initial Comments, p. 1.

3. ***Staffing Levels**: G.L. c. 164, § 1E (a) requires the Department to establish benchmarks for staff and employee levels of LDCs, and G.L. c.164, § 1E (b) requires that no company may reduce its staffing levels below what they were on November 1, 1997. However, the statute does not define what staffing levels are, e.g., whether they apply only to union employees or to all employees; whether staffing levels should include employees of non-regulated subsidiaries of the LDCs; and whether the lapse in time (between enactment of the statute and adoption of a performance-based rate plan) negates the November 1, 1997 requirement. Further, the statute does not provide for any penalty for the LDCs that do reduce their staffing levels below 1997 numbers. Please discuss the role of staffing levels in the future Guidelines.*

[4] As explained in Berkshire' Initial Comments, Berkshire has reported on its performance for this measure accurately and appropriately.
[5] Berkshire explains that it applies its best efforts to treat multiple calls for one incident as a single call for measuring response time. This good faith approach is reasonable, appropriate and the most practicable standard for this matter.

In its Initial Comments, the Company submitted that: 1) the term "staffing levels" applies solely to union employees of a regulated utility as of the date of a company's filing of a performance-based rate plan; 2) staffing levels should not include employees of non-regulated subsidiaries or divisions of the LDCs; 3) the effective date of the staffing level requirement is, at the earliest, the date a company files a performance-based rate plan; and 4) there should be no penalty provisions with regard to staffing level benchmarks in future Guidelines.

The Company maintains that the terms "collective bargaining agreements" and "labor organizations" as described Section 1E (b) of the statute requiring staffing benchmarks necessarily imply that these mandates apply to solely union personnel. The Attorney General apparently shares this view ("only the Legislature, not the Department, can alter the statutory requirement that labor (union) displacement is prohibited absent a collective bargaining agreement." AG Initial Comments, p. 4). Further, the Department has previously ruled in the Interim Order that "consistent with the statute, collective bargaining agreements that are reached on an individual utility basis will be the primary determinant of staffing levels for the purpose of determining compliance with the statute." August 29th Order, at 15.

The Initial Comments of the UWUA are consistent with the Company's position that staffing levels should not include employees of non-regulated subsidiaries or divisions of the LDCs. The UWUA comments state that "a regulated gas company that used to have a repair and service department but transfers those employees to an affiliate could be found in compliance with the staffing level benchmark if the regulated company still has the same number of employees carrying out key functions such as maintaining lines, answering phones, sending customer bills, etc." UWUA Initial Comments, p. 13. As noted in the Company's Initial Comments, the Department set cast off rates for Berkshire in D.T.E. 01-56 (2002) assuming that the costs of 59.09 union employees should be reflected in rates. At present the Company maintains 65 union employees that devote essentially all of their time to utility services and, therefore, the Company remains in full compliance with this benchmark.[6]

The Attorney General also argues that staffing levels should now be established as a penalty benchmark. AG Initial Comments, p. 4. The advancement of this position seems contrary to other views advanced in the Attorney General's Initial Comments. Specifically, the Attorney General cited the principle of "continuous improvement" and its applicability to utility service. AG Initial Comments, Att. 1, p. 13. Under this concept, "businesses commit themselves to strive for improvements in their work processes, with resulting improved services and products for their customers." Id. The Attorney General's comments anticipate the logical and appropriate argument that many PBR plans, including Berkshire's PCM Plan, penalize utilities for failing to make continuous improvements "through productivity offsets built into rate indexing plans." Id. at 13.[7] The Attorney General then goes on to provide what he purports to be the "counter-arguement" to this point, namely "that productivity adjustments reflect the assumption that utilities will produce the same amount of service with fewer resources (e.g., employees) . . . ." Id. at 13-14. The Attorney General is therefore arguing, first, that the consumer dividend does not provide an incentive for greater service quality because it is assumed that utilities will reduce staffing levels and then, at the same time, he argues that staffing reductions should be precluded by Section 1E. The Department should dismiss the Attorney General's wholly inconsistent arguments. Berkshire submits that staffing requirements, like any other SQ benchmark, should be established as part of the comprehensive review resulting in appropriate cast off rates and plan parameters.

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[6] The Company notes that prior changes with respect to its valued union employees were at all times made in a manner that is consistent with applicable collective bargaining agreements. In addition, the Company has sought and secured Department approval for a reorganization plan that resulted in the establishment of a holding company structure as well as the transfer of the Company's former retail propane and energy marketing activities to new affiliated entities. See The Berkshire Gas Company, D.T.E. 98-61/87 (1998). Thus, the Company necessarily satisfied the requirements of Section 1E with respect to these employee transfers by securing Department approval or making such changes consistent with the relevant collective bargaining agreement.

[7] Berkshire submits rate freeze components of the PBR plans provide a similar incentive. The PCM Plan reflected a 31-month rate freeze.

In sum, for all the reasons stated here and in its Initial Comments, Berkshire submits that it has fully complied with relevant staffing level requirements.

4. ***Standardization of SQ Performance Benchmarks**: In D.T.E. 99-84, at 3-4, the Department required that LDCs collect any data that may be necessary for the Department to revisit, in the future, the issue of using benchmarks based on nationwide, regionwide, or statewide data. The LDCs sent the Department a report on December 19, 2002 concluding that using the historical performance of each LDC on the respective performance measures remains the best method for establishing performance benchmarks. Summary of Findings Related To Service Quality Benchmarking Efforts, Navigant Consulting, Inc. (December 19, 2002). Please comment.*

In its Initial Comments, the Company explained that using the historical performance of each LDC on the respective performance measures remains the best method for establishing performance benchmarks and should be maintained in future Guidelines. Several commenters, along with Berkshire, reminded the Department that the fundamental purpose of the SQ Guidelines was to identify and penalize LDC's for any degradation in service while operating under PBR plans, and that the application of broader or more generic standards has no relation to this purpose. The UWUA's initial comments seem to share this view describing the SQ process as "one of the primary routes through which the Department can ensure that service quality does not decline . . . ." UWUA Initial Comments, p. 1. Again, the Guidelines were cast as a "basically sound structure." Id. at 2.[8]

The Attorney General ignores this consensus view as to the primary objective of the Guidelines and argues for increasing standards in connection with a goal of "continuous improvements." For Berkshire, such a change could result in an inappropriate alteration of the balance struck in the Company's PCM Plan (what the Attorney General accurately characterized as the "overarching regulatory bargain") and may constitute "recontracting." The

[8] The UWUA is not entirely consistent in its views. The UWUA states that, as a general matter, the SQ Guidelines are to protect against a "decline" in service. UWUA Initial Comments, p. 1. The UWUA also advocates, without providing for a cost adjustment, for raising a standard "whenever it is clear that a company is clearly meeting and exceeding the standard." Id. at 25.

Attorney General goes on to suggest that "customers should share in the benefits of improved performance." AG Initial Comments, Att. 1, p. 14. Under the Attorney General's argument, however, customers apparently do not share in any corresponding costs of such enhanced performance. Again, the more appropriate time to develop a fair and balanced PBR plan and any SQ feature of such plan is the cast off rate proceeding. A PBR plan that includes a SQ component requiring enhancing performance would likely involve a different consumer dividend, perhaps no rate freeze or greater flexibility in terms of adjusting rates.

The Attorney General suggests that there are procedural concerns with SQ assumptions in the PBR rate setting process as justification for employing generic standards. The Attorney General seems to criticize the PBR rate setting process because of the "inherent assumption that historical average performance was satisfactory." AG Initial Comments, Att. 1, p. 10. In fact, this is a most reasonable and appropriate assumption. Base rate proceedings involve a comprehensive review of a utility's operations necessarily assessing service quality which is reflected in rate case findings. In sum, the assumption that SQ performance at the outset of a PBR plan is adequate is entirely reasonable.

The Initial Comments of the Attorney General raise another important point regarding customer expectations about service quality, stating that "while customers expect good performance, they generally do not expect it to be perfect, and may prefer lower rates to higher service levels." AG Initial Comments, p. 20. The application of broader or more generic standards based on utilities far from the Northeast who are faced with differing operational, demographic and geographic challenges may be contrary to the expectations of Massachusetts consumers. In any event, if more generic standards are to be imposed, such change should only be made in the course of the comprehensive review of an overall PBR plan.

5. ***SQ Incentives**: Please comment as to whether any LDC should be allowed to collect incentives for SQ performance. MECo and Nantucket Electric Company (collectively "MECo"), are allowed to collect incentives back from ratepayers if it*

exceeds its benchmarks in the penalty provisions. The Department approved incentives as part of MECo's SQ plan because MECo's prior SQ plan, pursuant to Massachusetts ElectricCompany/Eastern Edison Company, D.T.E. 99-47, at 13, 31-32 (2000), contained penalty/reward structures, and in consideration of the potential benefits to ratepayers. D.T.E. 01-71B at 24 (2001).

In its Initial Comments, the Company submitted that the Department should not include incentives for SQ performance in Guidelines that apply to Berkshire, at least for the duration of its approved PCM Plan. However, Berkshire recognized that incentive opportunities can be a powerful tool and would evaluate and consider such an SQ structure in its next rate plan.

6. ***Customer Service Guarantees**: LDCs are currently required to pay $25.00 to any customer if they fail to meet a scheduled service appointment or fail to notify a customer of a scheduled outage. D.T.E. 99-84, at 38. Please discuss whether the future Guidelines should require (a) payment to customers whether or not the customer requests the credit; and (b) classification as a missed service appointment if the LDC contacts the customer within four hours of the missed appointment and re-schedules the appointment.*

In its Initial Comments, the Company submitted that the payment of the $25.00 customer guarantee should be maintained in future guidelines regardless of whether or not the customer requests such credit and that the Department should not require classification of a "missed" service appointment in instances where the distribution company has contacted the customer and appropriately rescheduled the appointment. This position was supported by several of the commenters.

7. ***Property Damage**: The Department established a reporting requirement regarding losses related to damage of company-owned property as it was likely to contribute to assessing company safety performance. D.T.E. 99-84, at 17. Please discuss whether this reporting requirement should be made a penalty measure in the future Guidelines.*

In its Initial Comments, the Company submitted that the current requirement to report information regarding damage to company property should not be made a penalty measure in future SQ Guidelines.

V. CONCLUSION

Berkshire maintains that the established SQ Guidelines have worked effectively and as an integral feature of the Company's PCM Plan. The comprehensive generic proceeding in docket D.T.E. 99-84 provided an adequate and thorough "upfront" approach to PBR ratemaking. The fact that service quality standards are largely being satisfied or exceeded is the best evidence that the Guidelines are working as intended. Berkshire believes that the appropriate course is to extend the established SQ Guidelines, in the case of Berkshire, at least for a period commensurate with the term of the PCM Plan.

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